

JAN 30 2015
Circuit Court - 1718

V.

14 CH 12277

ORDER

Lesner filed his Petition for Administrative Review on July 28, 2014, asking the court to reverse the Board's decision to discharge him. Petitioner, the Board, and the Superintendent briefed the issues and argued orally.

The Superintendent filed charges against Lesner and recommended that he be suspended for 60 days for violating three Rules of Conduct:

Rule 17: Drinking alcoholic beverages while on duty or in uniform, or transporting alcoholic beverages on or in Department property, except in the performance of police duty.

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witnesses testified, and numerous exhibits were admitted into evidence. The "Findings and Decision" (Decision) entered on July 17, 2014 recites that following the hearing, the Board members read and reviewed the record of proceedings, viewed the video-recording of the testimony of the witnesses, heard Hearing Officer Johnson's oral report, and conferred with Hearing Officer Johnson on the credibility of the witnesses and the evidence before rendering its decision. (Decision, pp. 1, 14).

In the penalty section of the Decision the Board first concluded that it has the authority to determine the appropriate penalty. Next, the Board discussed the evidence supporting the charges and found that Lesner "engaged in a series of decisions" on the night of the incident "that were reprehensible." (Decision, p. 9). The Board pointed out that Lesner "exercised extraordinarily poor judgment" that night. (Decision, p. 10). Further, the Board considered Lesner's breach of a department policy, Department General Order U04-02, Section II(C), with which he was not specifically charged, as an aggravating factor in determining the appropriate penalty for his violations of Rules 2 and 10. (Decision, p. 11). The Board emphasized the consequences of Lesner's taking advantage of his position, making a bad situation even worse, and making "essentially no effort to secure his weapon." (Decision, p. 11).

The Board also discussed Lesner's evidence in mitigation, which the Board characterized as "important" and noted that it had "carefully considered." (Decision, pp. 11-12). That evidence includes Lesner's distinguished record as a police officer, as shown by his numerous department commendations, honorable mentions, and awards (a life-saving award and a police officer of the month award among others). In addition,

the Board took account of the significant arrests Lesner made and his testimony about those arrests, as well as his good reputation in the community. The Board pointed out that Lesner cooperated with the Department in its investigation from the night of the incident, and he took responsibility for his actions by pleading guilty and expressing remorse at the hearing. Finally, the Board acknowledged the Superintendent's recommendation of a 60-day suspension which Lesner agrees is appropriate.

In conclusion, the Board explained the reasoning supporting its cause determination. The Board noted that Lesner's "conduct on the night in question and the lack of judgment he demonstrated are incompatible with continued service as a sergeant of police with the Chicago Police Department." (Decision, p. 12). The Board pointed out that "[t]his case does not involve an error in judgment while Sergeant Lesner was making a split second decision under stressful conditions while in the performance of his duties on the street. Rather, it involves a series of calculated and knowing decisions, made over the course of hours while on and off duty." (Decision, p. 13). Further, "[f]ar from demonstrating the professionalism that we expect of sergeants, who serve as supervisors and whose responsibilities include maintaining discipline, providing leadership and guidance, influencing subordinates and motivating them to perform their duties well, Sergeant Lesner ignored his training and the Department's rules altogether." (*Id.*). Finally, the Board wrote: "With all due respect to the Superintendent, where the pattern of misconduct is as extensive as we find in this case and the consequences of the misconduct are so grave, the Board finds that discharge is the only appropriate penalty." (*Id.*).

ANALYSIS

Judicial review of an administrative decision to discharge an employee requires the court to determine first, whether the agency's finding of guilt is against the manifest weight of the evidence, and second, whether the findings of fact sufficiently support the agency's conclusion that cause for discharge exists. *Walsh v. Board of Fire and Police Commissioners of the Village of Orland Park*, 96 Ill. 2d 101, 105 (1983). Because Lesner pled guilty to the charges, this case presents the latter issue. However, Lesner raises a threshold issue: whether the statute and the code authorize the Board to discharge when the Superintendent, through his recommendation of suspension, has determined that there is no cause for discharge.

The Board is authorized to discharge when the Superintendent, through his disciplinary recommendation, has determined that there is no cause for discharge.

Lesner begins his argument with the unquestionable proposition that the Board, as an administrative agency, has no inherent powers, but only the powers given to it by the legislature. The Board's powers come from the Illinois Municipal Code and the Municipal Code of Chicago (the Code). The former provides for police removals and suspensions in municipalities of more than 500,000 population, including a hearing before the police board, procedural rulemaking by the police board, and police board certification of its findings and decision for enforcement by the superintendent of police. 65 ILCS 5/10-1-18.1.

The Code provides for the establishment, membership, and organization of the Board consisting of nine members to be appointed by the mayor by and with the advice and consent of the city council. 2-84-020. Section 2-84-030 lists the Board's powers and

duties, which in part track the statute. As required by both codes, the Board established rules of procedure for its disciplinary hearings.

The Code also sets forth the responsibilities of the superintendent of police. "The superintendent shall be responsible for the general management and control of the police department and shall have full and complete authority to administer the department in a manner consistent with the ordinances of the city, the laws of the state, and the rules and regulations of the police board." 2-84-040. In Section 2-84-050 the Code lists the superintendent's powers and duties, which are expressly "[s]ubject to the rules of the department and the instruction of the board."

Lesner argues that the Code provisions empowering the Board and the Superintendent, when read together, make it clear "that the drafters intended to create a 'checks-and-balance' system of mutual limitations on the extent of their authority and the exercise of their powers." (Mem. in Support, p. 6). From this proposition he examines what he characterizes as limitations on the authority of the Board and of the Superintendent. Specifically, he points to the absence of statutory or regulatory authority for the Board to initiate discipline or take any action to review or impose discipline on its own. Similarly, he points to an officer's ability to initiate Board review of a six through 30-day suspension which he characterizes as "an express limitation on the Superintendent's authority to suspend." (Mem. In Support, p. 7). Further, he points to the Board's review of a six through 30-day suspension, after which the rules require the Board to vote either to sustain or reverse the order of the Superintendent, which he characterizes as an express limitation on the Board. Based on these provisions Lesner

reasons that the Board has the authority to determine if a suspension is warranted and to reverse or affirm the suspension, but that does not mean that the Board has the authority to increase the sanction.

Lesner maintains that discharge after a suspension recommendation requires express authorization in the statute, the Code, or the Board's procedural rules. Further, Lesner argues that the Board's "claimed authority to instruct the Superintendent to do whatever the Board wishes" is belied by the express limitation found in 2-84-030: "The board's power to adopt rules and regulations for the governance of the police department does not include authority to administer or direct the operations of the police department or the superintendent." Thus, Lesner contends: "[i]nherent in the Superintendent's decision to suspend an officer is his determination that there is no cause for discharge [and] nothing in the ordinances gives the Board the power or authority to reject that determination." (Mem. in Support, p. 9). Lesner maintains that "[w]hat is required is an express grant of authority empowering the Board to terminate an officer when the Superintendent has not sought [termination]." (Reply Mem., p. 5). For the Board to act without that express authority is the equivalent of allowing the Board to initiate discharge proceedings, which was not the legislators' intent.

The Board contends that the "Illinois General Assembly and the Chicago City Council have determined that the power to remove, discharge, or suspend an officer for more than 30 days rests with the [Board], a civilian oversight board, not the Superintendent. The Superintendent files the charges and thereafter participates as a *party* before the Board, *not* a decision maker." (Board Mem., p. 3) (emphasis in original).

Further, “the Superintendent’s disciplinary authority is expressly made subject to the instructions of the Board [with the] result that the Board has the power to instruct the Superintendent to impose any sanction it deems appropriate in cases in which the Superintendent has recommended a suspension in excess of 30 days.”

Similarly, the Superintendent argues that the “fair implication” of the legislation is that once charges are brought to the Board, the Board is authorized to decide if the officer is guilty of charges and also “to select any appropriate penalty within its range, including discharge, even if that penalty is greater or less than the initial recommendation by the Superintendent.” (Superintendent Mem., p. 7). Lesner contends the Superintendent is judicially estopped from arguing the Board’s position on administrative review after arguing for suspension in the administrative proceedings. However, judicial estoppel applies to statements of fact, and not to legal opinions or conclusions. *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 949 (1st Dist. 2010) (noting that *Johnson v. DuPage Airport Authority*, 268 Ill. App. 3d 409 (1994) extended judicial estoppel to legal inconsistencies, but the supreme court in *People v. Jones*, 223 Ill. 2d 569 (2006), restored the understanding of judicial estoppel as barring factual not legal inconsistencies).

The arguments of the Board and the Superintendent are persuasive. The express delegation of authority to decide the “over-30-day” disciplinary cases necessarily includes the authority to determine the appropriate penalty regardless of the Superintendent’s recommendation. To rule otherwise would effectively give the Superintendent the power to dictate the penalty, thereby usurping the Board’s authority

and obviating the evidentiary hearing provision. Thus, the plain meaning of the statute and the Code make clear the legislative intent for the Board to hear the evidence and decide the penalty in any case in which the Superintendent seeks more than a 30-day suspension. The statute and the Code do not show an intended system of checks and balances between the Board and the Superintendent. Rather, they show the intent to give the Board the responsibility to determine whether there is cause for discharge. The record sufficiently supports the Board's conclusion that cause for discharge exists.

Cause for discharge is a shortcoming which renders a police officer's continued employment with the department detrimental to the discipline and efficiency of the police force and which the law and sound public opinion recognize as a good reason for the officer not to occupy that position. *See Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 312 (1st Dist. 1992); *see also Caliendo v. Martin*, 250 Ill. App. 3d 409, 418 (1st Dist. 1993) (cause exists where misconduct "manifests a disrespect for the law and tends to undermine public confidence in the honesty and integrity of the police force"). An officer's violation of a single rule may be sufficient cause for discharge. *See Siwek v. Police Board of the City of Chicago*, 374 Ill. App. 3d 735, 738 (1st Dist. 2007).

"An administrative tribunal's finding of 'cause' for discharge commands our respect, and it is to be overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service." *Walsh*, 96 Ill. 2d at 105. The question is not whether the court would decide upon a more lenient sanction or conclude in view of the mitigating circumstances that a different penalty would be more appropriate. *Id.* at 106.

Lesner argues, in part, that an erroneous causation analysis by the Board forms the foundation of the Board's discharge decision. However, the decision reflects an

appropriate focus by the Board on Lesner's "reprehensible" decisionmaking and exercise of "extraordinarily poor judgment." The Board could not ignore the serious consequences of Lesner's conduct, meaning the access to his weapon, regardless of how it was used. Essentially, the Board held Lesner responsible, as did Lesner himself, not for the ultimate result, but for the penultimate, which was caused by Lesner's errors in judgment.

Lesner also argues that no cause for discharge exists as evidenced by the Superintendent's suspension recommendation and Lesner's post-incident assignments. According to Lesner, "the Superintendent will always be better able than the Board to determine the effect the officer's continued service will have on the Department." (Mem. in Support, p. 12). However, Lesner provides no authority for this proposition, which is contrary to the caselaw, which recognizes, as reflected in the legislative scheme, that the Board "is in the best position to determine the effect of an officer's conduct on the department." *Rodriguez v. Weis*, 408 Ill. App.3d 663, 671 (1st Dist. 2011). Further, the Board is not required to place dispositive weight on an officer's complimentary history. *Kappel v. Police Board of Chicago*, 220 Ill. App. 3d 580, 596 (1st Dist. 1991). Nor is the Board "required to suspend, rather than discharge, an officer solely because he has provided numerous years of good service, even where some of those years are subsequent to the misconduct." *Id.*

The record reflects that the Board weighed Lesner's excellent record in the performance of his duties against the serious nature of his misconduct. The Board then reasonably concluded that Lesner's misconduct warranted discharge. The Board's

decision to discharge Lesner was not excessive, unduly harsh, or unrelated to the needs of service. The facts of record sufficiently support the Board's conclusion that cause for discharge exists.

IT IS HEREBY ORDERED:

The administrative decision of the City of Chicago Police Board to discharge Chicago police sergeant Steven Lesner is affirmed.

Judge Kathleen G. Kennedy

ENTER:

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